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NESTER ET AL *v.* CONTINENTAL BREWING CO. ET AL.[1] SUPREME COURT OF PENNSYLVANIA.

Where a number of persons engaged in the same business, within the same territory, enter into an agreement, the object of which is purely and simply to silence and stifle all competition among themselves, the agreement is in restraint of trade, and void as against public policy. If it appears that such a combination is injurious to the public, the courts will not stop to inquire as to the degree of injury inflicted, nor whether the restraint be general or partial, nor will they consider the form and declared purpose of the combination.

A combination among brewers to prevent competition among themselves in the sale of beer is illegal.

CONTRACTS RESTRICTING COMPETITION.

The decision in the principal case exhibits a strict application of that rule of public policy, whose function has been to jealously guard against any invasion of public interests, by contracts which affect the freedom of trade and competition. As far back as the second year of Henry V (1415) (year-book 5–26), we find that contracts imposing a restraint upon trade were discountenanced, as being opposed to the common law.

In the Case of the Monopolies (1602) (11 Coke, 86), Chief Justice Popham held that the grant by letters patent to the plaintiff of the sole making of playing cards within the realm, was utterly void as being a monopoly, and against the common law. Among the four reasons advanced by the court were the following: 1. "All trades as well mechanical as

[1] Reported in 161 Pa. 473; decided May 14, 1894.

others, which prevent idleness (the bane of the Commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen, when occasion shall require, are profitable for the Commonwealth; and therefore the grant to the plaintiff to have the sole making of them, is against the common law, and the benefit and liberty of the subject. 2. The sole trade of any mechanical artifice or any other monopoly, is not only a damage to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees; and although provisions and cautions are added to moderate them, yet *res profecto stulta est nequitiæ modus*, it is mere folly to think that there is any measure in mischief or wickedness. And therefore there are three inseparable incidents to every monopoly against the Commonwealth; *a*, that the price of the same commodity will be raised; for he who has the sole selling of any commodity may and will make the price as he pleases; *b*, after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee having the sole trade regards only his private benefit and not the Commonwealth; *c*, it tends to the impoverishment of divers artificers and others, who before by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

This case, though involving what has been termed an involuntary restraint upon trade, illustrates in a comprehensive way the attitude of the courts in those early days toward anything that savored of a trade restriction or monopoly; and the language and reasoning of the court can be appropriately reiterated at this day.

Chief Justice Parker in the leading case of Mitchel *v.* Reynolds (1711), (1 P. Wms. 181), after examining the earlier decisions and considering the subject thoroughly, concludes as follows; "In all restraints of trade, where nothing more appears, the law presumes them void; but if the circumstances are set forth, that presumption is excluded, and the

court is to judge of those circumstances and determine accordingly; and if upon them, it appears to be a just and honest contract, it ought to be maintained."

In that case the circumstances disclosed to the mind of the court a reasonable restraint, and the obligation was accordingly held to be binding.

From the varying nature of contracts of the kind under consideration, it is not surprising that different judges have arrived at apparently different conclusions as to what shall be deemed "a just and honest contract," and especially has this become the case since the courts have abandoned the arbitrary rules of time and distance once in vogue, and come to consider such contracts under changed conditions, with a broader view, the question being in the language of Chief Justice Fuller (Gibbs *v.* Baltimore Gas Co., 130 U. S. 396): "whether under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not unreasonable." "Public welfare," says the Chief Justice, "is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained."

Most of the decided cases are those in which contracts have been entered into by a vendor of a business and its goodwill with his vendee, by which the vendor agrees not to engage in the same business within the same territory; in these cases the restrictive covenant is usually based upon a consideration, and is merely giving effect to the transfer of the goodwill.

In such cases the rights of the respective parties should be primarily considered and determined according to the test of "reasonableness;" if the restriction be reasonable, the rights of the public are not affected, for where the question is whether one party or another shall have the trade of a particular locality, as was said by Chief Justice Parker, "the concern of the public is equal on both sides."

If the restriction prove unreasonable, it should be the restricted party's right, as well as the imperative demand of public policy, that he be permitted to do that, which protection to the other party does not require, and which will bene-

fit him and consequently the public: See Oregon Steam Navigation Co. *v.* Winsor, 20 Wall, 64.

Public policy is always opposed to having a person deprive himself and the community of the benefit of his services; yet, when by contract the person does so restrict himself for a consideration, it is not the province of public policy to step in and say that the contract is presumably not binding, but for the courts to say, unless your covenant is unreasonable, you shall be bound by it as by any other. On the other hand, if the contract is between or among competitors, and is of such a nature and effect that it is certain competition will be utterly destroyed and a monopoly created, to the detriment of the public, then it is but proper for public policy (which is but a part of the common law) to declare that the public interests shall not be impaired or sacrificed, with no corresponding benefit save but to a few individuals. Such a declaration has been very positively made by the Act of Congress passed July 2, 1890 (U. S. Stat. at Large, 209), by which "every contract combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal, etc." This much of the Act, however, is but declaratory of the common law, and leaves undefined some of the terms it uses, and unsolved the questions which must necessarily arise under it, the same as before its passage. What is the proper test of illegality? How much may competition be affected without there being an undue restraint upon trade? To what extent shall public policy be permitted to impair the obligation of contracts? These are among the questions which deserve careful and practical consideration; and, in connection with the last, it may not be amiss to quote the language of Sir George Jessel, M. R., in Printing Co. *v.* Sampson, L. R. 19 Eq. 462: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy; because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their

contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract."

This injunction deserves attention, for occasionally we see displayed what seems to be a sort of spasmodic reverence for the high-sounding term "public policy," and a questionable decision is the result.

In this connection Judge Sanborn says: "It is with the public policy of to-day that we have now to deal. In considering that subject we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its Constitution, laws, and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that, it is unnecessary and unwise to pursue our inquiries."

Directing our attention, then, to some of the modern judicial decisions upon restraints of trade, we will make two classes: (1) those cases in which the restraint is confined to covenants to abstain from doing something, as trading under certain conditions; (2) those in which two or more parties, competitors in business, combine with a view toward concentrating or regulating the business.

In the first class, the injury to the public arises from the unreasonable abstinence from trade or profession, with its incidental effect upon competition; the vice in the second class occurs from the probable impairment or restriction of competition, and the tendency to create monopoly.

The writer does not purpose touching upon the cases under the first head, suffice it to say that the test of all such contracts would seem to be their "reasonableness:" Gibbs *v.* Baltimore Gas Co., *supra;* Fowle *v.* Park, 131 U. S. 96; Smith's App., 113 Pa. 579; Patterson on Contracts in Restraint of Trade,

24, 25; where the subject is carefully considered in a review of all the cases.

Practically, this same test was suggested by Parker, C. J. (1711), he using the words "just and honest" instead of "reasonable;" if it be a general restraint, it would very likely be unreasonable and unjust, hence void, especially at that time.

In the second class, *i. e.* combinations, the public interests are concerned to a greater degree, and the contracts in question must be weighed very carefully in the judicial balance, to ascertain whether, as regards the public, they are "just and honest." If, on the one hand, they are certain to destroy competition and create a monopoly, they are opposed to public policy, and void; if, however, they appear to afford but a reasonable protection or privilege to the parties, even though competition be incidentally affected, they should be supported and enforced. This theoretical distinction is one which is very difficult to be drawn in practice, and has been observed in some cases more consistently than in others. Competition has generally been regarded as the "life of trade," and as monopolies are inimical to competition, they have always been regarded as odious: Case of the Monopolies, *supra;* Richardson *v.* Buhle, 77 Mich. 632; Butcher's Union Co. *v.* Crescent City Co., 111 U. S. 755 (Field J.), and in many States, Acts similar to the "Anti Trust Act" of 1890, have been passed.

But monopolies of some form or other have at all times existed, and must necessarily exist; the people have survived them. It is indeed a question, judging from the present state of business affairs, whether competition is always the "life of trade," and never its destroyer? Where two railroads are operated in a section which can support but one, competition must force one or the other to the wall. Extremely low rates are very acceptable to the public while they last; subsequent bankruptcy, however, is not.

In the following cases combinations have been declared illegal, among manufacturers, to regulate rates of labor, hours of work, and conduct of business: Hilton *v.* Eckersly, 6 El. & Bl. 46; also Com. *v.* Carlisle, 1 Brightly (Pa.) 36. Employees: People *v.* Fisher, 14 Wend. 9; U. S. *v.* Working-

men's Amalgamated Council of New Orleans, 54 Fed. Rep. 994; Farmers' Loan and Trust Co. *v.* N. Pac. R. R., 60 Id. 803; *contra*, Com. *v.* Hunt, 4 Met. 111; Snow *v.* Wheeler, 113 Mass. 179. Boat proprietors: Hooker *v.* Vandewater, 4 Denio, 349; Stanton *v.* Allen, 5 Id. 434; Anderson *v.* Jett (Ky.), 12 S. W. Rep. 670; *contra*, Collins *v.* Locke, 4 App. C. 674; Mogul Steamship Co. *v.* McGregor, L. R. 2 App. C. (1892), 25. Stenographers: More *v.* Bennett, 140 Ill. 69. Coal operators: Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173; Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 558; U. S. *v.* Jellico Coal & Coke Co., 46 Fed. Rep. 433. Oil: State *v.* Standard Oil Co., 30 N. E. Rep. 279. Sugar: People *v.* North River Sugar Ref. Co., 121 N. Y. 582; aff. 54 Hun. 354. Grain: Crafts *v.* McConaghy, 79 Ill. 346; *contra*, Kellogg *v.* Larkin, 3 Wis. 124. Salt: Salt Co. *v.* Guthrie, 35 O. 666; *contra*, Ontario Salt Co. *v.* Merchant's Salt Co., 18 Gr. Ch. Rep. 540. Lumber: Mill & Lumber Co. *v.* Hayes, 76 Cal. 387. Cotton seed: Texas Standard Cotton Oil Co. *v.* Adoue, 19 S.W. Rep. 274. Candles: Emery *v.* Ohio Candle Co., 47 O. 320. Matches: Richardson *v.* Buhle, 77 Mich. 632; *contra*, Diamond Match Co. *v.* Roeber, 106 N. Y. 473. Cotton bagging: India Bagging Assn. *v.* Kock, 14 La. An. 168; Pacific Factor Co. *v.* Adler, 90 Cal. 110. Wire cloth: DeWitt Wire Cloth Co. *v.* N. J. Wire Cloth Co., 16 Daly, 529. Tobacco. Hoffman *v.* Brooks, 23 Am. Law Reg. 648. Mineral waters: Urmston *v.* Whitelegg, 63 Law Times, 455.

In Gibbs *v.* Baltimore Gas Co., *supra*, a combination of two gas companies of Baltimore was condemned by the Supreme Court of the United States, Chief Justice Fuller saying: "The supplying of illuminating gas is a business of a public nature, to meet a public necessity. It is not a business like that of an ordinary corporation, engaged in the manufacture of articles that may be furnished by individual effort. Hence, while it is justly urged that those rules, which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (Printing Co. *v.* Sampson, *supra*); yet, in the instance

of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain such contracts imposing such restraint, however partial, because in contravention to public policy."

This distinction between business of a quasi-public nature and private business, was considered by the Circuit Court of Appeals of the Eighth Circuit, in the recent case of U. S. *v.* Trans-Missouri Freight Ass'n, 58 Fed. Rep. 58, and gave rise to a dissenting opinion by Judge Shiras.

In that case a bill had been filed by the United States under the Act of 1890, to restrain fifteen competing railroad companies of the West from carrying into effect an agreement regulating the freight traffic, rates, etc. The Circuit Court of Kansas, dismissed the bill (Riner, D. J.), holding that there was nothing in the contract which necessarily tended to interfere with the rights of the public (53 Fed. Rep. 440). This decree was affirmed in the Circuit Court of Appeals by a divided court. Sanborn, Circ. J., held that "it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" that it was one of the kind of contracts, the purpose of which is "to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose," and was not, therefore, an illegal restraint of trade; that it was not only proper, but in accordance with public policy, that railroads should be allowed to enter into such arrangements with each other. Shiras, Dist. J., dissenting, relied upon the distinction laid down by Fuller, C. J. (quoted *supra*), and held that while the test as to private associations is undoubtedly the "reasonableness," and not the "existence" of restriction, yet such is not the test when the action of public corporations relative to public duties is brought in question; and further held, that it was "clearly contrary to the public welfare, and, therefore, illegal, for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of

free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway." In other words, that the public was entitled to absolutely free competition.

In the light of these most interesting opinions so recently delivered, we will turn at this point to our case of Nester *v.* Continental Brewing Co. This case arose upon a bill in equity for an account, and was heard upon bill and demurrer; the facts were that the plaintiffs were members and creditors of an unincorporated association, known as "The Brewers' Association, of Philadelphia," of which the defendants were also members: the agreement forming the association provided, *inter alia*, that "the undersigned hereby stipulate and bind themselves, one to the other, and do hereby agree, one with the other, not to sell and deliver any beer in the city and county of Philadelphia, and Camden and Camden county, N. J., after July 1, 1886, to any new trade, or any other brewers' customer or customers that belong to this association, during the continuance of this agreement, at less than eight dollars a barrel" (penalties were provided for violations); further, "The board of trustees may call the association together from time to time, and at any such meeting the price at which beer may be sold, may be changed by a vote of not less than two-thirds of all the members belonging to said association at the time of voting thereon."

The demurrer to the bill was sustained by the Common Pleas Court, Biddle, J., saying: "It cannot be gainsaid that the object of this combination is to enable the forty-five brewers of the County of Philadelphia, individuals, firms, and corporations, who have entered into it, to regulate and control the sales and prices of beer within the city of Philadelphia, and the County of Camden, N. J. It certainly is a combination in restraint of trade, tending to destroy competition, and to create a monopoly in an article of daily consumption."

This conclusion was endorsed by the Supreme Court, Sterrett, C. J., saying: "The test question in every case like the present, is whether or not a contract in restraint of trade exists,

which is injurious to the public interests. If injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious. So it is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, nor the extent of space included in the combination, but upon the existence of injury to the public."

The court seems to have construed this contract solely from the standpoint of the public, and aided possibly by a presumption against its validity, as soon as the name of the association was disclosed.

The test of "reasonableness" as applied to private business, recognized in both of the opinions in the Court of Appeals, *supra*, was not applied, but the test of Judge Shiras as to public corporations and business was practically used instead. This business was certainly not "*quasi* public"

The cases cited by the court probably support the decision; though in some, different elements were present; for instance in the Morris Run Coal Co. case, the combination was "wide in scope, general in its influence, and injurious in effects," because it controlled an immense coal field, the *source of supply* of an article of *prime necessity* for a very large territory. A brewery can be started where a coal mine cannot.

The following are cases in which combinations similar to this one have been sustained: Skrainka *v.* Schaaringhausen, 8 Mo. App. 522; Kellogg *v.* Larkin, 3 Wis. 124; Diamond Match Co. *v.* Roeber, 106 N. Y. 473; Central Shade Roller Co. *v.* Cushman, 143 Mass. 353; Wickens *v.* Evans, 3 Y. & J. 318; Collins *v.* Locke, 4 App. C. 674; Mogul S. S. Co. *v.* McGregor, 2 App. C. (1892) 25; Dueber Mfg. Co. *v.* Howard Watch Co., 55 Fed. Rep. 851; U. S. *v.* Trans-Missouri Freight Ass'n, 58 Fed. Rep. 58; and the recent case of Oakdale Mfg. Co. *v.* Garst (R. I.), 28 Atl. Rep. 973, which involved a combination among dealers in oleomargarine.

In the case of Harrison *v.* Lockhart, 25 Ind. 112, the court (Ray, J.) held that, as it has been the policy of the law to

discourage and restrict the traffic in intoxicating liquors, it would be a perversion of public policy, to apply it in cases of contracts in restraint of such a trade, the same as in others. Under the authority of this case, it might properly be asked, which way should public policy have swayed in the principal case?

Lord Bramwell says (Mogul S. S. Co. *v.* McGregor, *supra*): "Certain kinds of contracts have been held void at common law on the ground of public policy, a branch of the common law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law, than as expounders of what is called public policy. No evidence is given in these public policy cases. The tribunal is to say as matter of law, that the thing is against public policy and void. *How can the judge do that without any evidence as to its effect and consequences?*"

G. HERBERT JENKINS.

Philadelphia, July 26, 1894.